STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY THOMAS KITTKA,

Defendant-Appellant.

UNPUBLISHED
May 22, 2007

No. 269425
Oakland Circuit Court
LC No. 2005-201838-FH

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a). The trial court sentenced defendant to 18 months to 15 years in prison. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Complainant, defendant's niece, eight years old at the time, testified that she spent several nights at defendant's house, and that on the last such occasion she went to sleep on the floor in the basement, then awoke when defendant "put his hands somewhere he shouldn't have," clarifying that by that she meant her "[p]rivate," which she used to "[g]o to the bathroom." Complainant elaborated that defendant unbuttoned her pajamas, and touched her "private parts" under her underwear with his fingers moving "[k]ind of everywhere," until she pushed his hand away. Complainant added that defendant had touched her in this manner on at least one earlier occasion.

When interviewed by a police officer about the allegations against him, defendant protested that he knew nothing of any inappropriate touching, but raised the possibility that such a thing might have occurred while he was asleep.

Defendant was charged with two counts of CSC II. The jury convicted him of one count, but acquitted him of the other count.

On appeal, defendant challenges his minimum sentence on the ground that the trial court erred in scoring one of the offense variables, and argues that the trial court erred in failing to provide his jury with an instruction on the defense of accident. However, defendant admits that neither issue was preserved by a proper objection below.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). However, a criminal appellant may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. *Id.*; MCR 6.429(C); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). Defendant's failure to preserve his sentencing issue is fatal to it.[1] It is without merit in any event.

Defendant asserts as a scoring error that the trial court assessed 25 points for offense variable 13, which is the proper score where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Defendant's presentence investigation report (PSIR) indicates that complainant reported that defendant's assaultive behavior took place each time she spent the night at his house. A scoring decision will not be reversed if any evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

However, defendant points out that he was acquitted of one count of CSC II, and argues that the trial court was not entitled to assess points on the basis of its own conclusion that defendant committed more acts of CSC than what the jury determined beyond a reasonable doubt. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in the original). But our Supreme Court has reiterated that "'the Michigan system is unaffected by the holding in *Blakely* . . . .'" *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). The Court elaborated, "a defendant does not have the right to anything less than the maximum sentence authorized by the . . . verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Drohan*, *supra* at 159. Defendant's recourse to *Blakely*, *supra*, is thus unavailing. The sentencing court was and remains entitled to take into account all the facts of and circumstances of the crime, as determined by the court from various sources, including the PSIR. See *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). Further, as defendant acknowledges, MCL 777.43(2)(a) specifies that "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction*." (Emphasis added).

Moreover, because the recommended range for defendant's minimum sentence, as agreed by the parties, was 12 to 24 months, the trial court's decision to eschew an intermediate sanction in favor of a minimum term of imprisonment of 18 months constituted no departure for purposes

[1] Defendant moved this Court to remand this case to the trial court for resentencing, for the reasons raised on appeal, but failed to do so in timely fashion. See MCR 7.211(C)(1)(a). Accordingly, defendant's post-sentencing motion did not preserve this issue.

of bringing *Blakely*, *supra*, to bear. MCL 769.34(4)(a); *People v Uphaus*, ___ Mich App ___; ___ NW2d ___ (Docket No. 267238, pub'd April 3, 2007, at 9:10 a.m.), slip op at 1-2, 6.

For these reasons, we reject defendant's unpreserved sentencing challenge.

Defendant argues that the trial court should have instructed the jury on the defense of accident, in light of defendant's suggestion that any unwelcome touching of complainant may have occurred while defendant was asleep. We disagree. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Jury instructions should cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In this case, the trial court did instruct the jury that to find defendant guilty of criminal sexual conduct it had to conclude that his actions were "for sexual purposes or could reasonably be construed as having been done for sexual purposes." We conclude that this well enough covered defendant's alternative accident theory. Moreover, we observe that defense counsel answered in the negative when asked if he wished for any additions or corrections to the instructions, and expressly declined to object when asked to respond to the trial court's answer when the jury asked if a person is responsible for his actions while sleeping. Counsel's expressed acquiescence to the instructions as given waives appellate error. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

For these reasons, we must reject defendant's instructional challenge.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff